A

LYE KIM HIANG & ORS

v.

TAN AH KAW & ORS

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ARIFIN JAKA JCA
[CIVIL APPEAL NO: A-02-660-1998]

C

5 OCTOBER 2006

LAND LAW: *Acquisition - Compensation - Land held in undivided shares by co-proprietors - Part acquired held by appellants - Whether appellants entitled to whole compensation at the exclusion of other co-proprietors*

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In 1966 one VK Kalyanasundaram and A Krishnan ('the acquirers') bought a total of about 1250 acres of land in Larut, Perak ('the subject land') from one Frederico Marco and Countes PIA Telfener. The acquirers entered into separate written

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agreements with various persons for the purchase of several undivided shares in the subject land. The appellants were one of them. It was not disputed that although the subject land was not partitioned, a plan was drawn up showing the lot of land held by

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each purchaser. Further, the boundaries between each lot of the several co-proprietors were strictly adhered to. In the course of time, a portion of the appellants' share in the subject land was acquired by the relevant authority. The compensation paid was shared among the co-proprietors. Then later the appellants'

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remaining portion was acquired. On this occasion, an issue arose as to whether the appellants should receive the whole compensation at the exclusion of the others. That led to the appellants' application to the High Court claiming that they were solely entitled to the compensation thereof. The learned judge dismissed the application. Hence, this appeal.

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Held (allowing the appeal):
Per Gopal Sri Ram JCA delivering the judgment of the court:

I

(1) The parties herein had behaved towards each other over a considerable period of time and in such a way that they recognised each other's rights to their respective portions on

the subject land. By their course of conduct, they had accepted that despite their respective shares in the subject land being undivided, they were nevertheless entitled to assert their right and title over their particular portion thereof. It would be unjust and unfair to allow the respondents to go back on the common underlying assumption on which they and the appellants had acted upon over all these years. The equitable doctrine of estoppel was applicable. However, it would also be unfair and unjust to the respondents if the appellants were allowed to remain as registered proprietors of their undivided share in the subject land since their portion no longer existed. Accordingly, the appellants' application for declaration of entitlement to the compensation should be allowed on terms that their names be removed from the register and issue documents of title. (paras 4, 5, 6, 7, 8 & 9)

Obiter:

(1) It might appear at first blush that the relief granted appeared to cut across the indefeasibility rule housed in s. 340 of the National Land Code. But this was not the case. In this context it was unnecessary to recite the plethora of cases on the point. It more than sufficed to quote Raja Azlan Shah J (as he then was) in *Mercantile Bank Ltd v. The Official Assignee of the Property of How Han Teh*, ie, "... independent of our land legislation our courts have always recognised equitable and contractual interests in land ...". (para 10)

[Pursuant to s. 417 of the National Land Code, the Registrar of Titles was directed to delete the memorials in the plaintiff's favour appearing on the register and the issue document of title.]

Bahasa Malaysia *translation of headnotes*

Pada tahun 1966, seorang VK Kalyanasundaram dan A Krishnan ('pembeli') telah membeli sejumlah 1250 ekar tanah di Larut, Perak ('tanah tersebut') dari seorang Frederico Marco dan Countes PIA Telfener. Pembeli telah memeterai perjanjian bertulis yang berasingan dengan beberapa pihak bagi membeli bahagian-bahagian tak berbelah bagi tanah tersebut. Antara pihak-pihak tersebut adalah perayu-perayu. Tidak dinafikan bahawa, walaupun tanah tersebut tidak dipecah bahagi, satu pelan lakar telah disediakan

bagi menunjukkan lot-lot tanah yang dimiliki oleh setiap pembeli. Selain itu, sempadan-sempadan yang mengasingkan lot-lot tersebut juga diiktiraf dengan teliti oleh pihak-pihak. Selepas beberapa waktu, sebahagian dari bahagian tak berbelah bagi perayu-perayu dalam tanah tersebut telah diambil oleh pihakberkuasa yang relevan, dan pampasan yang dibayar telah dikongsi di antara pemilik-pemilik bersama tanah. Berikutnya, pihakberkuasa mengambil pula bahagian tanah perayu-perayu yang selebihnya. Pada waktu itu, isu berbangkit sama ada perayu-perayu patut menerima keseluruhan pampasan yang dibayar, sekaligus membawa perayu-perayu ke Mahkamah Tinggi bagi memohon perintah bahawa mereka berhak kepada keseluruhan pampasan. Yang arif hakim menolak permohonan dan perayu-perayu merayu.

Diputuskan (membenarkan rayuan):

Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Untuk satu jangka waktu yang panjang, tingkah laku pihak-pihak di sini sesama mereka menunjukkan bahawa mereka telah mengiktiraf hak mereka masing-masing terhadap lot-lot tanah yang berkenaan. Dengan tingkah laku sedemikian, mereka telah menerima bahawa, walaupun bahagian mereka masing-masing di dalam tanah tersebut tidak berbelah bagi, mereka bagaimanapun berhak menuntut hak serta hakmilik ke atas bahagian yang dipecah bahagi tersebut. Adalah tidak adil untuk membenarkan responden-responden kembali kepada andaian bersama di atas mana mereka dan perayu-perayu telah bertindak sepanjang tahun-tahun berkenaan. Prinsip ekuiti estopel adalah terpakai. Bagaimanapun, adalah juga tidak adil kepada responden-responden jika perayu-perayu dibenarkan menjadi pemilik berdaftar bahagian tidak berbelah bahagi mereka di dalam tanah tersebut, kerana bahagian mereka itu sudah tidak lagi wujud. Oleh itu, permohonan perayu-perayu untuk pengisytiharan bahawa mereka berhak kepada pampasan harus dibenarkan dengan syarat nama-nama mereka hendaklah dikeluarkan dari daftar dan isu dokumen hakmilik.

Obiter:

(1) Sekali imbas, relif yang diberi mungkin dilihat sebagai menyanggahi kaedah ketakboleh-sangkalan yang termaktub di dalam s. 340 Kanun Tanah Negara. Namun itu bukanlah kesnya di sini. Dalam konteks yang ada, tidaklah perlu untuk

mencatat kesemua kes-kes atas isu ini. Memadai untuk merujuk kepada kata-kata Raja Azlan Shah H (sebagaimana beliau pada waktu itu) dalam *Mercantile Bank Ltd v. The Official Assignee of the Property of How Han Teh*, iaitu "... terasing dari perundangan tanah kita mahkamah kita sentiasa mengiktiraf kepentingan-kepentingan ekuiti dan kontraktual pada tanah ..." A B

[Pendaftar Hakmilik hendaklah mengeluarkan nama plaintif dari daftar dan isu dokumen hakmilik di bawah s. 417 Kanun Tanah Negara]

Case(s) referred to: C
Amalgamated Investment & Property Co Ltd (in liquidation) v. Texas Commerce International Bank Ltd [1982] QB 84 ***(foll)***
Lindsay Petroleum Co v. Hurd [1874] LR 5 PC 221 ***(foll)***
Mercantile Bank Ltd v. The Official Assignee of the property of How Han Teh [1969] 2 MLJ 196 ***(refd)***
Sarat Chunder Dey v. Gopal Chunder Laha 19 IA 203 D
Solle v. Butcher [1950] 1 KB 671 ***(refd)***
Yeoman's Row Management Ltd & Anor v. Cobbe [2006] EWCA Civ 1139 ***(foll)***

Legislation referred to:
National Land Code, ss. 340, 417 E

For the appellants - S Theivanthiran (A Mariadass with him); M/s Thevin Chandran & Assoc
For the respondents - Saranjit Singh; M/s AS Saini & Assoc

[Appeal from High Court, Taiping; Originating Summons No: 24-84-98(T)] F

Reported by Usha Thiagarajah

JUDGMENT G

Gopal Sri Ram JCA:

[1] This case has a long history. It begins in 1966. In that year, one VK Kalyanasundaram and A Krishnan ("the acquirers") bought from Frederico Marco and Countes PIA Telfener a total H of about 1250 acres of land in Larut, Perak ("the subject land"). It appears that the acquirers then entered into written agreements with various persons and sold off to one or more of them several undivided shares in the subject land. One such agreement is in issue in this case. It is dated 23 August 1966. It will be referred I to in this judgment as "the said agreement". It may also be

mentioned that so far as this case is concerned, at the material time there were about 84 persons who had purchased undivided shares from the acquirers. Although the subject land was not partitioned, a plan was drawn up showing the lot of land held by each purchaser. Further, the boundaries between each of the lots of the several co-proprietors as shown on the map were strictly adhered to on the ground. It is clear that for a great many years all the several co-proprietors behaved towards each other as if they were mutually bound by the several individual agreements entered into by each of them with the acquirers. It is also in evidence that over a long period of time the co-proprietors treated themselves as bound by the notional subdivision that had taken place as binding on him or her as well as his or her successors. There is evidence that many, if not all, those who acquired undivided shares in the subject land from the acquirers went into possession and cultivated each of their individual lots. For completeness it may lastly be mentioned that each of the undivided share of the respective purchasers was in fact registered.

[2] It is against this historical background that the plaintiffs' case must be viewed. And their case is this. By the said agreement they and one Lai Gim Kuay, deceased, purchased an undivided share in the subject land pursuant to and under the terms and conditions of the said agreement. In the course of time a portion of what they regarded as their share in the subject land was acquired by the relevant authority. The compensation that was received from the relevant authority was shared among the co-proprietors whose lots were affected as delineated in the plan in question and in recognition of each of their respective rights.

[3] Later, in March 1998 another acquisition exercise took place. This resulted in what remained of the plaintiffs' portion of the subject land being wholly acquired by the appropriate authority. But their names continued to remain on both the issue and the register documents of title. That is because they were all registered as co-proprietors of undivided shares in the whole of the subject land. When on this occasion the issue arose as to whether the plaintiffs would be entitled to receive the compensation some of the co-proprietors took the position that the plaintiffs were not entitled to receive the whole of the compensation although, in accordance with the said agreement and the plan, it was only the plaintiffs' portion that was affected. But there were others who were in agreement with the plaintiffs. In consequence, the plaintiffs took out an originating summons in

essence claiming that they were solely entitled to the compensation payable by the appropriate authority. That summons was resisted by the defendants. The learned judge who heard the summons dismissed it. The plaintiffs then appealed to this court.

[4] The position in this case is clear enough. The evidence on record reveals that the parties to these proceedings behaved towards each other over a considerable period of time – some 30 years or more – in such a way as to recognise each other's rights to their respective portions on the subject land. Their acts and omissions – or to borrow the more compendious term employed by Lord Shand in *Sarat Chunder Dey v. Gopal Chunder Laha* 19 IA 203, their "actings" – toward each other constitutes a course of conduct by which they accepted that despite their respective shares in the subject land being undivided, each was nevertheless entitled to assert right and title only over the particular portion whose boundaries were marked off in accordance with the said agreement and the plan in question. It is therefore now too late for the defendants to assert; as they have done in the court below and in this court; that they are not bound by the said agreement as they are not parties to it. Indeed, it would be manifestly unjust for the defendants to make such an assertion.

[5] The rights of the parties to this appeal must accordingly be determined by principles "substantially equitable" – to borrow the words of Sir Barnes Peacock when delivering the Advice of the Board in *Lindsay Petroleum Co v. Hurd* [1874] LR 5 PC 221 at 239-240. And the equitable doctrine that falls to be applied in the present instance is that of estoppel as expounded by Lord Denning in *Amalgamated Investment & Property Co Ltd (in liquidation) v. Texas Commerce International Bank Ltd* [1982] QB 84:

> *When the parties to a transaction proceed on the basis of an underlying assumption* – either of fact or of law – whether due to misrepresentation or mistake makes no difference – *on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so.* If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands. (emphasis added.)

[6] The flexibility of the doctrine of estoppel has been very recently recognised and affirmed by the English Court of Appeal in *Yeoman's Row Management Ltd and Another v. Cobbe* [2006] EWCA Civ 1139 (judgment handed down on 31 July 2006) where Mummery LJ said: "A doctrine designed to grant relief for unconscionable conduct covers a wide spectrum of situations and needs to be flexible."

[7] Applying well established principles to the peculiar facts of this case, it is crystal clear that it would be unfair or unjust to allow the defendants to go back on the common underlying assumption on which they and the plaintiffs have acted upon over all these years. The defendants therefore cannot say that they are not parties to the said agreement and are consequently bound by it or by the plan. They cannot be allowed to assert their legal rights as registered co-proprietors of undivided shares in the subject land because it would be unjust for them to do so.

[8] But that is not the end of the matter. As matters stand, the plaintiffs will continue to remain as registered proprietors of their undivided share in the subject land despite the fact that their portion no longer exists after the latest acquisition exercise. It would be unfair and unjust to the defendants to permit such a state of affairs to continue to exist. Accordingly, it is only just that the plaintiff's be granted their remedy on terms that ensure justice to the defendants as well. Here is where equity demonstrates its flexibility in the sphere of judicial remedies. Traditionally Courts of Equity have fashioned relief to ensure a just and equitable result. See, for example, *Solle v. Butcher* [1950] 1 KB 671, where the tenant of premises was granted declaratory relief on terms.

[9] On the particular and peculiar facts of this case this court concluded that the plaintiffs should have the declaration of entitlement to the compensation on terms that their names be removed from the register and issue documents of title forthwith upon their receiving the compensation they are justly entitled to as their undivided share in the subject land longer exists. So, for the reasons already given the appeal was allowed. Acting under s. 417 of the National Land Code 1965 ("the Code"), the Registrar of Titles was directed to delete the memorials in their favour appearing on the register and the issue document of title. No order as to costs was made by reason of the peculiar circumstances of this case.

[10] A few words in conclusion. It may appear at first blush that the relief granted appears to cut across the indefeasibility rule housed in s. 340 of the Code. But this is not the case. And in this context it is unnecessary to recite the plethora of cases on the point. It more than suffices to quote Raja Azlan Shah J (as he then was) said in *Mercantile Bank Ltd v. The Official Assignee of the property of How Han Teh* [1969] 2 MLJ 196:

> The Official Assignee's view is not correct, *Vallipuram*'s case is against him. He forgets that independent of our land legislation our courts have always recognised equitable and contractual interests in land. See *Loke Yew v. Port Swettenham Rubber Co* [1913] AC 491; Innes 202 SC. See also section 206(3) of the National Land Code.